IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .

EDNA B. ELIAS,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The statement of the case, the questions presented, reference to the opinions of the Court below and of the Board of Tax Appeals, and the basis of jurisdiction of this Court, have been set forth in the petition. The statutes involved are quoted in the Appendix.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that petitioner was taxable under Sec. 22(a) of the Act of 1934, upon the income for 1934 and 1935 from these trusts, even though she re-

served no control or management of the trust funds during the period from July 1, 1929 to January 15, 1936;

2. In holding that, in the case of trusts for six and a half years with income distributed to grantor's family, retention by the grantor of control over the trust funds pending the trust, was not necessary to make the income taxable to the grantor pursuant to Sec. 22(a) under the doctrine of *Helvering* v. *Clifford*;

3. In holding that the control factor to bring the case within Sec. 22(a) should be inferred from the relationship between the petitioner and the trustee, her husband, notwithstanding that the Board had made no finding to such effect but had found to the contrary supported by evidence of an adverse personal interest of the husband;

4. In failing to consider Sec. 166 of the Revenue Act of 1934, and to hold that petitioner was not taxable under that section upon the income for 1934 and 1935 from these trusts;

5. In failing to consider Sec. 166 of the Act of 1934, and to hold that, if construed to tax the petitioner on the income, especially the ordinary income, for 1934 and 1935 from these trusts, the section would to such extent be invalid as a violation of the Fifth Amendment to the Constitution of the United States;

6. In failing to consider Sec. 167 of the Act of 1934 and to hold that petitioner was not taxable under that section upon the capital gains for 1934 and 1935 from these trusts;

7. In failing to consider Sec. 167 and to hold that if construed to tax the petitioner upon the capital gains for 1934 and 1935 from these trusts, the section would to such extent be invalid as a violation of the Fifth Amendment; and

8. In affirming the order of the Board on the taxpayer's appeal, and in reversing it on the Commissioner's appeal.

Summary.

Points I and II of the argument deal with the questions concerning petitioner's tax liability under *Sec. 22(a)*, which was the only section the applicability of which was passed upon by the Court below.

Points III and IV deal with Secs. 166 and 167, in case for the purpose of reviewing the judgment below it should be deemed necessary to consider the applicability of those sections also.

Argument.

I.

In holding that the petitioner was taxable under Sec. 22(a) without the retention by her of any control over the trust funds, the decision of the Court below is in conflict with the decision of this Court in *Helvering* v. *Clifford*.

The Court below agreed with the Board that petitioner "surrendered all control of these trust funds and all income arising from them" until after January 15th, 1936 (R. 146). Nevertheless, viewing these

as trusts for six and one-half years with income distributed in the family (but not to the grantor), the Court took the position that "the failure of the settlor to reserve any control or management of the fund pending the trust was not an important factor" (R. 146), and that "Legal powers of management add very little to such a reversioner's actual control over the fund while the trust lasts" (R. 147).

The Court considered that it was already committed to the proposition, that in the case of a trust for something less than ten years, retention of control over the corpus is not a necessary factor to bring the case within Section 22(a), because the limited period of the trust is considered as a matter of law to give the grantor the equivalent of the required control (R. 146-7), citing its own previous decisions in *Commissioner* v. *Barbour,* 122 F. (2d) 165, *Commissioner* v. *Woolley,* 122 F. (2d) 167, *Commissioner* v. *Buck,* 120 F. (2d) 775, *Commissioner* v. *Jonas,* 122 F. (2d) 169.

In taking that position, the decision of the Court below conflicts with the principles laid down by this Court for such cases in *Helvering* v. *Clifford,* 309 U. S. 331. There, in sustaining the application of Sec. 22(a) to a five year term trust, this Court emphasized the following as necessary elements (at pp. 335 and 336):

> "And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary * * *.
>
> So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the

> same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have.
>
> * * *
>
> Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position.
>
> * * *
>
> But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had."

If the short duration of the trust had been deemed of itself to be sufficient to supply the control factor, there would have been no occasion for this Court, in the *Clifford* case, to so emphasize the retention of legal control as an essential fact.

The Court below, in saying that "the failure of the settlor to reserve any control or management of the fund pending the Trust *was not an important factor*" (R. 146), expressed a view contrary to that of this Court in the *Clifford* case, where it was said at page 336:

> "In those circumstances (where the income remains in the family group) the *all-important factor* might be retention by him of control over the principal." (Italics ours.)

The rule of the *Clifford* case does not appear to have been changed in later decisions of this Court.

In *Hormel* v. *Helvering,* 312 U. S. 552, the grantor and his wife were in control of the trust funds; but the Board had made no findings as to any adverse interest of the wife nor as to the control for the purpose of the application of Sec. 22(a). The point actually decided there by this Court, was that Sec. 22(a) could be raised for the first time on appeal, and the case was remanded to the Board for further hearing on the merits.

In *Helvering* v. *Richter,* 312 U. S. 561, this Court merely decided the procedural question, and disclaimed any intention of passing upon the merits.

Harrison v. *Schaffner,* 312 U. S. 579, involved a mere assignment of a sum of money payable out of trust income for a year.

Therefore the holding of the Court below that retention of control was not necessary to bring these trusts within Section 22(a), is contrary to the rule prescribed by this Court in the *Clifford* case. Whether such a change is to be made in that important doctrine, is a question which this Court should decide.

II.

In so far as the Court below held that the control factor for the purposes of Sec. 22(a), should be inferred from the relationship between the petitioner and the trustee, her husband, notwithstanding that the Board, upon substantial evidence, had found to the contrary, the Court below exceeded its jurisdiction.

In support of its decision to apply Sec. 22(a), the Court below mentioned the relationship between the

petitioner and the trustee, her husband, and referred to them as "living together in obvious harmony" (R. 147), although the Board had made no finding to that effect.

The Board found that the husband trustee was at all times financially able to support the children, the beneficiaries (R. 60), who were all minors while these trusts were in existence, excepting Robert Henry Elias who attained his majority on September 17th, 1935 (R. 53; 59).

Under the law of New York, since he was able to support their children, the husband alone, and not the petitioner, was personally liable for the children's support. *Laumeier* v. *Laumeier,* 237 N. Y. 357, *364-5*; *Gladding* v. *Follett,* 2 Dem. Surr. 58, affirmed 30 Hun 219, affirmed 95 N. Y. 652; *Lyons Estate,* 137 N. Y. Supp. 171; *Commissioner* v. *Yeiser,* 75 Fed. (2d) 956 (C. C. A.—6), at pages *957, 958; Savage* v. *Commissioner,* 82 Fed. (2d) 92 (C. C. A.—3), at pages *93, 94.*

This point, together with the trust provisions giving the husband power to apply principal as well as income, in his discretion, for the support and education of the beneficiaries (R. 55; 119), furnished a substantial basis for the Board's findings that "the husband clearly had a substantial adverse interest in the disposition of both corpus and income" (R. 63), and that petitioner retained no powers of control over the corpus, leading to the conclusion that she was not taxable under Section 22(a) (R. 62-3).

The assumption of the Court below that petitioner's wishes would be heeded by the trustee, her husband (R. 148), appears to be contrary to its own previously expressed opinion "that she surrendered all control of these funds" (R. 146).

However if the Court meant to say merely that there was no express reservation in the trust instruments, and to leave the way open to a finding that petitioner's relations with the Trustee were such that through him she retained control over the trust funds, the difficulty would be that the Board's finding was to the contrary (R. 63).

The trust provision, and the finding, to the effect that petitioner reserved the right to change the trustees (R. 57; 122), referred to appointing and changing substituted or successor trustees, it did not empower her to remove her husband because he was appointed trustee for life (R. 54; 55; 56; 117; 119; 120). Such was the construction concurred in by the Board and the Court in finding that petitioner reserved no power of control over the corpus (R. 63; 146).

The family relationship between petitioner and her husband, the trustee, might have justified the inference that he would not disregard her wishes, if there had been no countervailing circumstances.

But here the husband's adverse interest to apply income and principal if he thought necessary, to relieve him of his obligation for the children's support, would at least justify, if it did not indeed require, the inference that he would act according to his own judgment or interest. In the face of such adverse interest it certainly could not be assumed *as a matter of law,* that petitioner controlled the Trustee. *Commissioner* v. *Yeiser, supra; Commissioner* v. *Prouty,* 115 F. (2d) 331 (C. C. A.—1), at page *336.*

To weigh the conflicting inferences and to decide which should prevail, and to draw the ultimate conclusion of fact as to whether petitioner had retained

control of the corpus through the trustee and whether in view of all the surrounding circumstances she remained the owner for tax purposes, was the function of the Board.

The Court of review had no power to reverse the Board unless the Board decision "is not in accordance with law". *Inter. Rev. Code, Sec. 1141 (c)(1)*, quoted in the Appendix.

In *Helvering* v. *Clifford* (*supra*), this Court said, at page 336:

> "Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership, and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband (the grantor) was the owner of the corpus for the purposes of Sec. 22(a)."

And at page 338:

> "The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of Sec. 22(a)."

In the present case the findings of the Board did not support the Court's conclusion that the trusts were within Sec. 22(a), and by undertaking to reverse the Board on questions of fact, the Court exceeded its jurisdiction.

III.

Sec. 166 of the Revenue Act of 1934 was not applicable to these trusts for the years 1934 and 1935; if construed to be so applicable it would to that extent contravene the Fifth Amendment to the Constitution.

Sec. 166 of the Act of 1934 does not apply where, as in this case, during the tax years the power to revoke was not exercisable but contingent.

So far as material here, Sec. 166 of the Revenue Act of 1934 (quoted at length in the Appendix), dealing with revocable trusts, provided:

> "Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (1) In the grantor * * *
>
> then the income of such part of the Trust" shall be included in grantor's income.

The Board held that the Section did not apply here (R. 65), citing *Corning* v. *Commissioner,* 104 F. (2d) 329 (C. C. A.—6). There in a case involving the same statute, the settlor had reserved the right to revoke two trusts, exercisable after his father's death with respect to one trust, and two years after his father's death with respect to the other; and the Court held (at p. 332) that Sec. 166 did not apply, because the settlor could not be vested with a power that was not presently nor with certainty exercisable *in futuro,* since a power which is not presently exercisable and may never be capable of being exercised, does not exist.

Congress, in adopting the Revenue Act of 1934, refused the request of the Treasury Department to deal with "term trusts", but amended Sec. 166 by striking out the words *"during the taxable year"*. (*Helvering* v. *Wood,* 309 U. S. 344, *348;* Compare Sec. 166 in the Acts of 1932 and 1934, quoted in the Appendix.) As explained on the floor of Congress and in the Conference Committee Report on the amendment, the change in Sec. 166 was aimed at so-called "year-and-a-day trusts" (see extracts from Congressional Record, quoted in Appendix, pp. 39-40, *infra*).

The "year-and-a-day trusts", were revocable by the grantors upon notice of a year and a day, or revocable in one year upon notice given before the end of the previous year. Such trusts were substantially different from the ones here involved, because those trusts were revocable by the grantors at any time provided that the required notice be given; the condition attached to the power was one within the control of the grantor. Whereas in the present case, for six and a half years, the power was not exercisable but contingent; and during that period the grantor had surrendered all control of the corpus and income, as the Court below recognized (R. 146).

In *Reuter* v. *Commissioner,* 118 F. (2d) 698 (C. C. A.—5) and *Helvering* v. *Dunning,* 118 F. (2d) 341 (C. C. A.—4), cert. denied October 13, 1941, both involving trusts which could be revoked effective after a period of about five years, the view was expressed that such trusts came within Sec. 166 of the Act of 1934. Nevertheless in both of those cases the grantors had reserved control as Trustee, so that they were taxable in any event under Sec. 22(a).

In the *Dunning* case, at pages 343-4, the Court thought that *Corning* v. *Commissioner* (*supra*) was

distinguishable on the ground that there the power was subject to a condition precedent, but finally (at p. 345) resorted to the principles of *Helvering* v. *Clifford,* in order to avoid the question as to the constitutionality of applying Sec. 166 to such a situation, concerning which question the Court expressed some doubt.

In *Helvering* v. *Wood, supra,* this Court did not pass upon the application of Sec. 166 to such trusts as the present ones, but merely dealt with a technical *term trust.*

Thus, the question as to whether Sec. 166 of the Act of 1934, applies in the case of trusts such as these, where the power was not exercisable but contingent for a period of six and a half years, is an important question concerning which there is a conflict or at least uncertainty in the decisions of the Circuit Courts of Appeals; the question has not been but should be settled by decision of this Court.

If construed to apply to the present situation where the trusts were created five years before the Act of 1934, Sec. 166 would have a retroactive effect and would impose an arbitrary and unreasonable tax in violation of the Fifth Amendment to the Constitution.

Since the Trusts were created in 1929, with the ordinary income effectively disposed of to named beneficiaries and with no power in the grantor to alter or revoke the trusts prior to January 15th, 1936, the application of the statute as amended in 1934 to tax the grantor upon the income for 1934 and 1935, would impose an arbitrary and retroactive tax against her with respect to previously closed transactions and upon beneficial interests already transferred to others, without any opportunity on her part to dispose of

her property differently in view of the tax. Such a tax effect has been regarded as a violation of the Fifth Amendment to the Constitution, especially since it would amount to measuring her income tax by reference to the income of others.

In *Blodgett* v. *Holden*, 275 U. S. 142, it was held that gifts made prior to June 2, 1924, were not taxable under the Gift Tax provision of the Revenue Act approved on that date. Four of the Judges held, at page *147*, that so far as the Act undertook to impose a tax on prior gifts, it was arbitrary and invalid under the due process clause of the Fifth Amendment to the Constitution. While the other four Judges, for whom Mr. Justice Holmes wrote the opinion, held that the law applied only to gifts made after the effective date of the Act, at page *149*, saying:

> "* * * the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule 'would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways'. *Lewellyn* v. *Frick*, 268 U. S. 232, 251, 252."

See also:

Hassett v. *Welch*, 303 U. S. 303, *314*.

In *Helvering* v. *Helmholz*, 296 U. S. 93, it was held that Sec. 302(d) of the Revenue Act of 1926, would violate the Fifth Amendment, if applied to a transfer in trust made before its enactment, which left no power in the grantor to revoke without the consent of other beneficiaries of the trust.

In *Nichols* v. *Coolidge*, 274 U. S. 531, it was held that Section 402(c) of the Act of 1919 requiring the inclusion, for Estate Tax purposes, of property transferred to take effect in possession or enjoyment at or after death, was invalid as in violation of the Fifth Amendment in so far as it applied to property transferred by a decedent before the passage of the Act, the Court, saying at page 542:

> "An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death.
>
> * * *
>
> This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

See also:

> *Hoeper* v. *Tax Commission*, 284 U. S. 206, *at page 215.*

Reinecke v. *Smith*, 289 U. S. 172, does not support the application of Sec. 166 in the present case. The *Reinecke* case involved Sec. 219(g) of the Act of 1924 which taxed the grantor where he had the power to revoke in conjunction with anyone not a beneficiary; the Court regarded the possession of the power in conjunction with one not a beneficiary, as equivalent to possession of control by the grantor himself, so that

the section was properly applied even in the case of a trust created before the Act. But the power there involved was presently exercisable, not an inchoate or conditional power as in the case at bar.

Therefore, the question as to whether Sec. 166 of the Act of 1934, may be applied to the trusts here involved, without contravening the Fifth Amendment to the Constitution, is at least a doubtful question which has not been but should be settled by decision of this Court.

IV.

The capital gains for 1934 and 1935 were not taxable to the petitioner under Sec. 167; to construe this section in the Act of 1934 to tax such gains to petitioner would give the statute an effect in conflict with the Fifth Amendment.

The capital gains for 1934 and 1935 were not taxable to the petitioner under Sec. 167, because in those years it could not be determined who would ultimately become entitled to such gains.

In providing that the capital gains should become part of the corpus (R. 55; 118-9), the trust deeds merely followed the local law of New York governing the construction and administration of these trusts. *Commissioner* v. *Waterbury*, 97 F. (2d) 383 (C. C. A. —2), at *page 386*, cert. denied 305 U. S. 638; *United States* v. *Stroop*, 109 F. (2d) 891 (C. C. A.—6), at page *894*.

Sec. 167 of the Revenue Act of 1934 (set forth in the Appendix) so far as material here provided in

substance, that there shall be taxed to the grantor such part of the trust income as

(1) *may, in the discretion of the grantor* or of any person not having an adverse interest, or of the grantor and such person jointly, be distributed, or be held or accumulated for future distribution, to the grantor; or

(2) *is* (absolutely) held or accumulated for future distribution to the grantor.

As to the first condition, relating to *discretionary power* to have income distributed or held or accumulated for future distribution to the grantor:

If the petitioner survived and the trusts continued until after January 15, 1936, then the petitioner by revoking the trusts might become entitled to the capital gains included with the corpus (R. 56; 64).

But in the years 1934 and 1935, such a future contingent right was not the discretionary power to have income "distributed or held or accumulated for future distribution to the grantor" within the meaning of Sec. 167.

In *Commissioner* v. *Waterbury, supra*, where a trust created on August 13, 1929, was revocable after January 1, 1930, and capital gains realized on sales made prior to January 1, 1930, were included with the corpus which the grantor became entitled to receive upon revoking the trust after that date, it was held that such gains were not taxable to the grantor under Sec. 167 of the Revenue Act of 1928, the Court saying at page 386:

> "Moreover, it is not clear it was intended that the grantors could require the trustee to earmark

capital gains and retain them separate from any other part of the trust estate. The power to revoke the trust does not constitute discretionary control over disposition of the income within the meaning of Sec. 167. Revocable trusts are taxed pursuant to Sec. 166, which the petitioner admits is not applicable here.

It is erroneous to assume that because the grantors could acquire the trust property through the exercise of the powers of revocation in future years any income presently retained by the trustee could be taxed under Sec. 167. At all times during 1929 the taxable gains were not the property of the respondents but were the property of the trust."

To the same effect, see *Commissioner* v. *Grosvenor*, 85 F. (2d) 2 (C. C. A.—2), at *page 3; United States* v. *Stroop* (C. C. A.—6), *supra, at page 894.*

The *Waterbury, Grosvenor* and *Stroop* cases were decided under Section 167 of the Revenue Act of *1928* (set forth in the Appendix).

But so far as material here, the only change in *Sec. 167* made by the Act of 1932, which was reenacted without change in the Act of 1934, was to provide that trust income should be taxed to the grantor, where it *is* held or accumulated for future distribution to him, in addition to where it *may in the discretion of the grantor* be distributed, or held or accumulated for future distribution, to him.

Hence, the decisions in the *Waterbury, Grosvenor* and *Stroop* cases, *supra,* establish that in 1934 and 1935 the capital gains were not subject to distribution to petitioner, or held or accumulated for future distribution to her, *in her discretion,* or in the *discretion* of any one not having an adverse interest, within the meaning of Sec. 167 of the Act of 1934.

Therefore it only remains to consider whether in the years 1934 and 1935, it could have been said that the capital gain "*is* * * * held or accumulated for future distribution to the grantor", within the meaning of Sec. 167 as amended in the Acts of 1932 and 1934.

Here, in 1934 and 1935 it could not be said that the capital gains were held or accumulated for future distribution to the petitioner, because in those years it could not be determined who would ultimately become entitled to the corpus.

In *Corning* v. *Commissioner, supra,* where the grantor would have become entitled to accumulated income in the event of revoking the trusts after his father's death, the Commissioner in asserting the deficiency invoked Sec. 167 as well as Sec. 166, of the Act of 1934. Nevertheless, the Circuit Court of Appeals of the Sixth Circuit reversed the deficiency.

In *Graff* v. *Commissioner,* 117 F. (2d) 247 (C. C. A. —7) and *Altmaier* v. *Commissioner,* 116 F. (2d) 162 (C. C. A.—6), cert. denied 312 U. S. 706, a different result was reached under Sec. 167 (of the Acts of 1934 and 1932), in the latter case the Court expressing disapproval of its prior attitude on this question in the *Corning* case. But in so construing Sec. 167 in the *Graff* and *Altmaier* cases, the Court relied upon the decision of this Court in *Helvering* v. *Hallock,* 309 U. S. 106 which, however, involved the estate tax. Subsequently in *Helvering* v. *Campbell,* 313 U. S. 15, this Court pointed out that its decision in *Helvering* v. *Hallock,* involving the estate tax, was not to be applied in construing the income tax.

In *Helvering* v. *Campbell* (*supra*), it was held that, after a legatee had sold, and received the pro-

ceeds of, the securities bequeathed to him, his taxable gain might properly be measured by taking as a basis the value of the securities at the time that he first acquired a contingent interest under the will, this Court saying at page 21:

> "But unlike the situation in *Helvering* v. *Hallock*, 309 U. S. 106, we are not concerned here with the question as to when the transfers took effect for the purposes of the estate tax * * *."

And at page 22:

> "But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence to carry into that computation the earlier value of the property is not to tax them on values which they never received."

In so saying, this Court appears to have recognized that the income tax is not, and cannot be, imposed on values which the taxpayer has not received and which he may never receive depending on future contingencies beyond his control.

In the case at bar, what eventuated in *1936*, could not affect the tax liability for 1934 and 1935.

Therefore, Sec. 167 of the Act of 1934 was not applicable here to the capital gains of 1934 and 1935; at least the question has not been but should be settled by decision of this Court.

The application of Sec. 167 of the Act of 1934 to the capital gains from these trusts for 1934 and 1935, would give the statute a retroactive effect and would impose an arbitrary and unreasonable tax in contravention of the Fifth Amendment.

As observed above, Sec. 167 as it read in the Act of *1928*, was not applicable to the capital gains from these trusts.

If, therefore, the change in the language of Sec. 167, which was first adopted in the Act of 1932 and re-enacted in 1934, be construed to tax this petitioner upon the capital gains from these trusts (created in 1929), the statute would to that extent have a retroactive effect upon a closed transaction in taxing the petitioner upon gains not received by her, without her having any opportunity to change the transfer in trust in view of the subsequently imposed tax burden.

Such an arbitrary retroactive tax result is prohibited by the due process clause of the Fifth Amendment to the Constitution of the United States. (See *Blodgett* v. *Holden, supra; Nichols* v. *Coolidge, supra; Helvering* v. *Helmholz, supra.*)

Moreover, to impose on petitioner an income tax for 1934 and 1935 with respect to capital gains, which in those years were not distributable to her, and of which the ultimate disposition depended on future contingencies beyond petitioner's control, would likewise impose on her an arbitrary and unreasonable tax. *Hooper* v. *Tax Commission, supra;* see also *Gibbons* v. *Mahon,* 136 U. S. 549, at page *558,* and *Eisner* v. *Macomber,* 252 U. S. 189, *at pages 202-3.*

At least the question as to whether Sec. 167 of the Act of 1934 may be applied to the capital gains of these trusts for the years 1934 and 1935, without contravening the Fifth Amendment to the Constitution of the United States, is one involving such doubt that it should be settled by decision of this Court.

CONCLUSION.

For these reasons the petition for the writ should be granted, in order that the important questions of Federal law may be settled by this Court.

Respectfully submitted,

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